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Docket # 97-234
92-52
90-264

January 26, 1998

Office of the Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Proposed Competitive Bidding Procedures
47 CFR Parts 73 and 74
67 Fed. Reg. 65392 (December 12, 1997)

Members of the Commission:

The following comments are submitted with respect to the above-referenced proposed rule regarding bidding procedures for mutually exclusive applications for commercial radio and television licenses. These comments are being submitted by this firm on behalf of its client J. Thomas Lamprecht, who has had pending before the FCC since 1982 an application for a construction permit for an FM station.

Two aspects of the proposed rules raise serious legal questions and require modification by the Commission. First, it would be not only inequitable but arbitrary and capricious to apply the proposed bidding procedures to cases where an applicant has made and had adjudicated a claim of unconstitutional discrimination by the Commission by the United States Court of Appeals or the United States Supreme Court. Second, the Commission lacks the legal authority to create special bidding and award policies for female-owned applicants, as contemplated in paragraph 90 of the Notice of Proposed Rulemaking, FCC 97-397, and paragraph 35 of the synopsis published in the Federal

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Register, 62 Fed. Reg. 65392, 65397.

Applications Subject to Judicial Determination of Unconstitutional Discrimination

Paragraph 22 of the Notice of Proposed Rulemaking, FCC 97-397 and paragraph 3 of the published notice, 62 Fed. Reg. 65392, 65393 request comments on whether it would be equitable to use the auction procedure for a small subset of pending applications "that had progressed either to an Initial Decision by an ALJ or a decision by the former Review Board, before the court found in Bechtel II that the integration criterion used by the Commission was unlawful."

Whatever the merits of applying the auction procedure to the handful of other cases included in this "subset," we believe it would be especially inequitable, arbitrary and capricious to apply these procedures to any case where an applicant, following full administrative consideration of the application, raised and successfully litigated a constitutional challenge to one or more factors considered in the proceeding.

Such cases are more appropriately handled through a new comparative hearing based on the record already developed. Such a hearing would be convened for the limited purpose of reconsidering the relevant factors **minus** those factors judicially determined to be unconstitutional or unlawful for some other reason. Principally, the factors judicially excluded from consideration are, first, gender, *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992), and second, "integration," *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

The proposed regulations fail to accord appropriate legal weight to the judicial decisions that remanded particular cases to the Commission for further consideration. In most, if not all cases, such remand orders required that the Commission adjust administrative decisions already made in light of an extensive administrative record already developed.

For example, the U.S. Court of Appeals remanded Mr. Lamprecht's case twice to the Commission, first to reconsider its

decision without regard to the gender of the applicants (following its decision in *Lamprecht v. FCC*) and second, to reconsider its decision in light of its holding in a subsequent case, *Bechtel v. FCC*. *Bechtel* invalidated the Commission's "integration" factor, which effectively eliminated or severely diminished the weight accorded local residence and increased the weight given to prior broadcast experience.

In each instance, the Court of Appeals remanded the case to the Commission with express orders to reconsider the case without reference to the above factors in light of the existing record. In the first instance, the court said:

> We turn finally to the question of remedy...It is well settled...that once we correct an agency's error of law, we must remand for the agency to exercise its discretion, assuming, of course, that the agency retains any discretion to exercise....We have held on the record before us that the Commission's sex-preference policy violates the Fifth Amendment. <u>On remand, therefore, the agency must determine who, in the absence of this unconstitutional policy, should receive the permit to build the station in Middletown.</u>
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> 958 F.2d 398-399 (emphasis supplied)

The language employed by the Court of Appeals makes it clear that the Commission's authority extends only to correcting an error in a proceeding otherwise complete. It does not confer on the Commission the authority to decide Mr. Lamprecht's application according to a wholly new regulatory framework, one that subjects Mr. Lamprecht and other applicants to different selection procedure altogether.

Not only would the proposed rules violate the clear language of the remand language in *Lamprecht* and other cases, it would do substantial injustice to Mr. Lamprecht and other applicants whose constitutional rights were legally judged to have been violated. Following such a judicial finding, it was incumbent upon the Commission to determine promptly who would have received the license in the absence of its unconstitutional discrimination.

Following the *Bechtel* decision, the Commission was further required to eliminate the "integration" factor from the equation in pending comparative license disputes. In Mr. Lamprecht's case, this effectively would have required the Commission to award the license promptly to Mr. Lamprecht, based on his greater broadcast experience. This was the sole remaining significant factor differentiating his application from that of his competitor.

To require Mr. Lamprecht and other similarly situated individuals to now participate in an auction (an auction that, as discussed below, might well include gender preferences) would not correct the Commission's prior discrimination. Rather, it would subject Mr. Lamprecht to further burdensome regulatory hurdles as a consequence of it.

For these reasons, the Commission must modify the proposed rules to exempt from auction procedures those handful of cases that have already proceeded through the administrative process and now are subject to binding judicial decisions and remand orders.

Gender Preference

The proposed rules are objectionable for a second reason. According to paragraph 90 of the Notice of Proposed Rulemaking, FCC 97-397, and paragraph 35 of the synopsis published in the Federal Register, 62 Fed. Reg. 65392, 65397, the Commission is considering whether "special policies are warranted for female-owned applicants. In *Lamprecht v. FCC*. 958 F.2d 382 (D.C. Cir. 1992), the Court of Appeals struck down such a preference on the grands that is was not "substantially related to achieving diversity on the airwaves." 958 F.2d 398. The Commission has not, as part of these proposed rules, put forward any evidence that would support a link between female ownership and diversity in programming. Without establishing such a link, the proposed gender preference would be as constitutionally faulty as the one struck down in *Lamprecht*.

Supreme Court cases decided since *Lamprecht* reinforce the

conclusion there reached. In *United States v. Virginia*, 116 S.Ct. 2264, (1996), for example, the Court held that, "parties who seek to defend gender based government action must demonstrate an 'exceedingly persuasive justification' for that action." 116 S.Ct. at 2274. The Court went on to describe the intermediate standard of scrutiny applicable to gender-based distinctions:

> The State must show "at least that the (challenged) classification serves 'important government objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives." *(citations omitted)*. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalization about the different talents, capacities, or preferences of males and females.
>
> 116 S.Ct. at 2275-76

This test described by the Court in *United States v. Virginia* is precisely the test used by the *Lamprecht* court to invalidate gender preferences in broadcast licensing. The *Lamprecht* court held that there was no demonstrated relation between the gender of the station owner and the Commission's goal of increasing program diversity. The doctrine of *res judicata* precludes the Commission from resurrecting gender preferences in the course of creating a new regulatory procedure for distributing contested licenses, this one based on auctions rather than hearings.

For the above reasons, the undersigned respectfully requests that the Commission modify the proposed rules in two respects: first, by creating a narrow exception to the auction rules for cases that are subject to binding judicial decisions correcting one or more legal errors in administrative proceedings otherwise substantially complete and second, by eliminating any gender preference in the bidding procedure.

Sincerely,

Terence J. Pell
Senior Counsel

cc:

J. Thomas Lamprecht

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